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No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FIRST UNITED FUND, LTD.,
Petitioner,

v.

BROCKTON SAVINGS BANK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does a federal district court have "inherent power" to issue an order contrary to the express language of an applicable federal rule of civil procedure, and then to enter a substantial default judgment against a defendant for failure to comply with such order?

2. Does a federal district court have "inherent power" to enter a substantial default judgment ($783,868.63) against a defendant, a principal basis for which is the defendant's failure to comply with a magistrate's order that its employee-witnesses, located outside of the territorial limits of the district court's subpoena power set forth in Fed. R. Civ. P. 45, attend and be examined at a hearing on plaintiff's motion for discovery sanctions?

3. Does Fed. R. Civ. P. 55 afford a defaulted defendant the right, at a post-default hearing to assess damages, to establish the extent to which a plaintiff's conduct proximately caused some or all of its damages, where plaintiff's total loss is otherwise liquidated and certain in amount?

LIST OF PARTIES

The caption of the case in this Court contains a list of all of the parties that participated in the proceedings in the United States Court of Appeals for the First Circuit. Defendants Peat, Marwick, Mitchell & Co., James Blanton and C. Dean York, although named as appellees in the caption of the case in the court of appeals, did not participate in that appeal, having earlier had plaintiff's claims against them dismissed by the United States District Court for the District of Massachusetts. Petitioner believes that defendants-appellees Peat, Marwick, Mitchell & Co., James Blanton and C. Dean York have no interest in the outcome of this petition, and so notifies this Court and its Clerk pursuant to Rule 19.6 of this Court.

GLOSSARY OF ABBREVIATIONS

The following abbreviations will be used for participants in the proceedings below or other entities:

First United	Petitioner First United Fund, Ltd.
Brockton	Respondent Brockton Savings Bank

Peat, Marwick	Peat, Marwick, Mitchell & Co.
Penn Square	Penn Square Bank, N.A.
FDIC	Federal Deposit Insurance Corporation
FSLIC	Federal Savings and Loan Insurance Corporation

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES

Petitioner First United is a wholly-owned subsidiary of First United Financial Corporation.

The following entities are also wholly-owned subsidiaries of First United Financial Corporation:

Seaside Ventures, Ltd.

Interactive Information Systems, Inc. (formerly First United Satellite Information Systems, Inc.)

Consolidated Realty Group, Inc. (formerly First United Realty Corporation)

Second Source, Inc.

The following entity is a wholly-owned subsidiary of First United Fund, Ltd.:

Bingo Palace, Inc.

The following are affiliated entities:

Cindy Real Estate Partners, Inc.

First Fund Management Corporation

First New York Securities, Inc.

Hawaiian Properties, Inc.

MFS Partners, Inc.

MN Associates, Ltd.

Stanmark Corporation

Waikiki Gateway Partners, Inc.

Nevada Holding Company, Inc.

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BROCKTON SAVINGS BANK,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner First United respectfully prays that a writ of certiorari issue from this Court to the United States Court of Appeals for the First Circuit to review the judgment entered by the court of appeals on August 26, 1985.

OPINIONS BELOW

The final default judgment of the United States District Court for the District of Massachusetts (App. 113a) was entered on January 29, 1985 and is unreported. The opinion of the United States magistrate recommending entry of a default judgment and other sanctions (App. 83a) was entered on May 14, 1984 and is unreported. The order of the district court adopting the magistrate's recommendation (App. 111a) was entered on August 9, 1985 and is unreported. The opinion and judgment of the

United States Court of Appeals for the First Circuit (App. 1a, 114a) were entered on August 26, 1985 and are reported at 771 F.2d 5 (1st Cir. 1985).

JURISDICTION

The opinion and judgment of the court of appeals were entered on August 26, 1985. (App. 1a, 114a). First United filed a petition for rehearing and suggestion for rehearing *en banc* on September 9, 1985, which was denied on October 7, 1985. (App. 115a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The following constitutional provision and rules of civil procedure involved in this case are reproduced in the Appendix:

1. The Due Process Clause, U.S. Const. amend. V (App. 117a).
2. Fed. R. Civ. P. 37(b) (App. 119a).
3. Fed. R. Civ. P. 45(e)(1) (App. 123a).
4. Fed. R. Civ. P. 55 (App. 124a).
5. Fed. R. Civ. P. 60(b) (App. 126a).

STATEMENT OF THE CASE

This petition seeks review of the judgment of the court of appeals affirming a default judgment entered against petitioner First United in the amount of $783,868.63, plus attorneys' fees and costs. The default judgment was entered on January 29, 1985 by the United States District Court for the District of Massachusetts, based on a recommendation by a magistrate, as a sanction for alleged discovery abuses by First United and its former counsel.

The principal discovery dispute that led the district court to default First United concerned whether First

United had wilfully disobeyed a magistrate's order to produce copies of solicitation letters sent to prospective clients. First United had produced copies of the word processing forms of such letters sent as part of regular mass mailings, but did not produce copies of all of the actual letters mailed because it did not retain them. The magistrate, disbelieving First United's representations and affidavit that it did not retain copies of all actual letters mailed, ordered First United to produce its president and an employee-affiant, both nonresidents of the forum district, for cross-examination by him. First United's disobedience of that order is the basic reason for the extreme sanctions recommended by the magistrate.

On February 24, 1983, Brockton filed a complaint against First United, Peat Marwick and two partners of Peat Marwick charging that First United, a broker-dealer in securities, made false representations to Brockton that led Brockton, on April 28, 1982, to purchase a $1,000,000 certificate of deposit ("CD") (bearing 16% interest) in Penn Square. (App. 128a). On July 5, 1982, Penn Square was declared insolvent. (App. 2a, 135a). Brockton, alleging violations of federal securities laws, various state statutes and the common law, claimed $1,000,000 in compensatory damages, plus multiple damages, interest and attorneys' fees. (App. 128a-158a). On March 25, 1983, First United answered, generally denying the complaint's allegations, and asserting affirmative defenses, one of which was that Brockton's loss resulted from its own conduct. (App. 179a, 187a).

On February 24, 1983, Brockton had requested that First United answer interrogatories and produce documents, including all documents relating to its solicitation of prospective clients. (App. 159a, 172a). First United objected to Brockton's requests on various grounds. (App. 189a, 211a). First United did produce certain of its word processing forms of solicitation letters. (App. 193a, 213a). No mention was made in First United's responses of copies of *actual* letters sent to its potential customers.

(App. 189a-218a). On May 9, 1983, Brockton moved to compel further discovery, but did not specifically challenge First United's production of only the word processing forms of the solicitation letters. (App. 219a-225a).

Brockton's motion was heard by a magistrate on October 18, 1983.[1] (App. 18a-35a). First United stressed the irrelevance and burden of Brockton's requests, which would have required production of thousands of transaction confirmation slips. (*Id.*) Although Brockton demanded all information as to other buyers of CDs (App. 23a-25a), no specific discussion was had as to the production of copies of *actual* solicitation letters sent to prospective clients, as distinguished from the word processing forms of those letters (App. 18a-35a), certain of which Brockton had already received. (App. 23a-24a, 193a, 213a). The magistrate ordered interrogatories answered by November 23, 1983, and all documents produced by December 5, 1983. (App. 32a-34a).

On January 18, 1984, the district judge entered a limited protective order in response to an earlier request by First United, and ordered all documents produced within ten days. (App. 91a). After a production of documents by First United on January 27, 1984 (including twelve additional word processing forms of solicitation letters) (App. 91a-92a), Brockton moved on February 7, 1984, for sanctions pursuant to Fed. R. Civ. P. 37(b), including entry of a default judgment and other relief. (App. 228a). In connection with its February 7 motion, Brockton complained for the first time that First United had produced only forms of the solicitation letters.

On March 1, 1984, the magistrate heard Brockton's motion for sanctions. (App. 37a-66a). Before the hearing,

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[1] The district court first considered Brockton's motion to compel further discovery at an off-the-record conference on August 18, 1983. The court directed First United to produce a list of all Penn Square CD transactions, which list First United subsequently produced with the names of its clients opaqued for confidentiality reasons. (App. 88a-89a). Brockton then renewed its motion to compel.

First United filed the affidavit of Christine L. Alexander, a secretary responsible for mailing solicitation letters, attesting that First United retained only the various forms of the letters, and not copies of actual letters mailed. (App. 232a). *See also* App. 234a, 236a. At the hearing, the magistrate characterized Ms. Alexander's affidavit as a "notice of destruction" (App. 53a); stated that he had never seen "this type of defiance" (App. 45a); and said that he found First United's retention of only the forms of its solicitation letters "incredible." (App. 52a). He thereupon ordered First United's counsel to tell the president of his client and Ms. Alexander to "go down to LaGuardia" and to "get on the shuttle and get up here" that afternoon. (App. 53a, 54a). The hearing was recessed for that purpose. (App. 55a).

At the resumed hearing on March 1, First United's counsel advised the magistrate that First United's president could not be reached. (App. 55a). First United's counsel offered a deposition of his client concerning its non-retention of copies of actual letters mailed. (App. 58a, 62a). The magistrate rejected the offer, stating: "I want your client produced in this courtroom—in this courtroom under oath . . . ." (App. 62a). The hearing was again recessed for that purpose until March 6. (App. 65a).

It is not disputed that First United, its president and Ms. Alexander all reside beyond the territorial limits of the district court's subpoena power as defined by Fed. R. Civ. P. 45(e)(1). (App. 9a). At the resumed hearing on March 6, 1984, First United's counsel advised the magistrate that First United would not produce the witnesses for examination, stating first that he believed that First United had been given an opportunity, but had not been ordered, to produce the witnesses. (App. 68a). When the magistrate advised counsel that he had ordered the witnesses to appear, counsel stated that First United "chooses not to obey." (*Id.*) In response, the magistrate

announced his intention to recommend the full range of possible sanctions, including a default judgment, contempt sanctions, attorneys' fees, and the institution of disciplinary proceedings against counsel.[2] (App. 72a-73a).

On May 14, 1984, the magistrate filed his opinion recommending, *inter alia*, a default judgment against First United. (App. 83a-110a). Although the magistrate decided that First United had violated three other court orders, a major, if not the principal, reason for the sanctions was First United's disobedience of the magistrate's March 1 order to produce the nonresidents for cross-examination. (App. 93a-100a, 108a). He made no finding or conclusion that First United's conduct, apart from its failure to produce the witnesses, justified such extreme sanctions. *See generally* App. 83a-110a. The magistrate rejected First United's argument that Rule 45 limited his power to compel attendance of nonresidents. He reasoned that he possessed such power because, in appropriate circumstances, he could order that nonresident parties be deposed in the forum (App. 97a), and concluded that the "power to compel further testimony, at least on the matter at issue, is inherent and so obvious as to require no citation of authority." (App. 98a).

On August 9, 1984, without opinion, briefs or argument, the district court adopted the magistrate's recommendation *in toto*. (App. 111a). On August 23, 1984, Brockton moved for a default judgment of $613,333.33 (the balance of the $1,000,000 CD not yet recovered from the FDIC), plus interest, costs and unliquidated attorneys' fees. The magistrate entertained Brockton's motion on January 24, 1985. First United contended that it was

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[2] On March 16, 1984, First United retained its present counsel, who appeared at hearings before the magistrate on March 19 and 21, 1984. (App. 7a, 95a). New counsel argued, *inter alia*, in a brief to the magistrate, that, under Fed. R. Civ. P. 45, the magistrate lacked power to compel the nonresident witnesses to appear before him, and thus could not sanction First United for disobeying that order. (App. 95a-96a).

entitled to prove, at an evidentiary hearing, that some or all of Brockton's loss was proximately caused by Brockton's behavior in investing an amount substantially in excess of the limits of FDIC insurance on deposits. (App. 8a). The magistrate ruled that this causation argument was foreclosed by the default. (*Id.*) On January 29, 1985, he recommended entry of judgment for $783,868.63, plus costs and unliquidated attorneys' fees.[3] (App. 112a). On January 29, 1985, the district court, again without opinion or argument, entered judgment as recommended. (App. 113a). First United filed a notice of appeal on February 21, 1985.

On August 26, 1985, the court of appeals affirmed the district court's judgment. (App. 1a, 114a). The court did not hold that the magistrate had the power to compel the nonresidents to appear, notwithstanding the strictures of Fed. R. Civ. P. 45(e)(1) (App. 8a-14a); nor did it hold that the default judgment was an appropriate sanction under Fed. R. Civ. P. 37(b). (App. 11a). Instead, the court of appeals, observing that this Court had instructed it to favor a district court's exercise of discretion (App. 10a), concluded that the judgment was an appropriate exercise of the district court's "inherent power" to sanction "abusive litigation practices." (App. 11a-14a). The court of appeals also held that the question whether and to what extent Brockton's loss was proximately caused by its own conduct was foreclosed by the default because Brockton's loss was liquidated and certain. (App. 14a-17a). First United's petition for rehearing, addressed to this latter holding, was denied without opinion on October 7, 1985. (App. 115a).

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[3] The parties stipulated that the $783,868.63 figure was calculated correctly, assuming that the proximate cause issue was foreclosed by the default. The stipulation preserved First United's right to raise the proximate cause issue. (App. 8a).

REASONS FOR GRANTING THE WRIT

This case presents the question whether a district court has inherent power to enter an order that contravenes a specific rule of civil procedure, for the purpose of investigating alleged discovery abuses, and then to enter a default judgment based on the defendant's refusal to comply with such an order. At bar, a magistrate ordered First United's nonresident employees to appear at hearings in the forum, in contravention of the express language of Fed. R. Civ. P. 45. The court of appeals held, in effect, that the express commands of Rule 45 were overridden by the judiciary's "inherent power" to explore and remedy abusive litigation practices.

The analysis adopted by the court of appeals disregards this Court's directive that the propriety of discovery sanctions not be judged by notions of "inherent power." The court's ruling also conflicts with applicable decisions of this Court, and of other courts of appeals, that there is no inherent judicial power to do what is specifically proscribed by applicable rules of civil procedure. Finally, the court's analysis offends traditional principles of due process because there is absent at bar the essential precondition, established by this Court in *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), to the due process validity of a default judgment, namely, that the order violated be a valid one.

The court of appeals further erred in affirming the district court's refusal to permit First United to prove, after default, that some or all of Brockton's damages were proximately caused by its own actions and Peat Marwick's conduct. The court of appeals' ruling, if it stands, severely limits the ability of litigants to contest damage awards at post-default hearings pursuant to Fed. R. Civ. P. 55.

I. The "Inherent Power" Analysis Adopted by the Court of Appeals Sanctions a Departure from the Accepted and Usual Course of Judicial Proceedings Established by Applicable Decisions of This Court and Courts of Appeals.

A. *The Court of Appeals' Analysis Disregards This Court's Directive That Inherent Power Not Be Used to Analyze the Propriety of Discovery Sanctions.*

Rule 45(e)(1) provides in relevant part:

> A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial . . . .

It is uncontested that First United, its president and Ms. Alexander, First United's affiant, are located or reside beyond the territorial limits of the subpoena power conferred by Rule 45(e)(1).

It was for this reason that First United argued to the magistrate and the court of appeals that the magistrate's March 1, 1984 oral order directing the attendance of First United's nonresident employee-witnesses at the March 1 and March 6 hearings was invalid because it exceeded the subpoena powers delimited by Rule 45(e)(1). *In re Guthrie*, 733 F.2d 634, 637-39 (4th Cir. 1984); *Jaynes v. Jaynes*, 496 F.2d 9, 10 (2d Cir. 1974); *GFI Computer Industries v. Fry*, 476 F.2d 1, 5 (5th Cir. 1973); *Steel, Inc. v. Atchison, Topeka & Santa Fe Railway*, 41 F.R.D. 337, 339 (D. Kan. 1967).[4] If the magistrate's March 1 order was invalid, First United cannot be sanctioned for having violated it. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 354 (1909) (propriety of sanc-

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[4] Rule 45(e)(1) does not distinguish hearings and trials. Hence, the holdings in *GFI Computer Industries*, and the other cases cited, apply with equal force to subpoenas to attend hearings.

tions for failure to make discovery depends on the legality and sufficiency of the underlying discovery orders).[5]

In affirming the default judgment, the court of appeals did not question this legal framework. Indeed, it treated the magistrate's order as subject to Rule 45, and noted initially that "how one characterizes the challenged court action probably determines the result one reaches on this issue." (App. 9a). Nonetheless, the court of appeals chose not to rule on the validity under Rule 45 of the order compelling the nonresidents to attend (App. 8a-14a), and declined even to decide whether the default judgment was an appropriate Rule 37 sanction. (App. 11a). The court of appeals concluded instead that the magistrate had the "inherent power" to investigate, explore and sanction "abusive litigation practices." (App. 11a-14a).

The "inherent power" approach taken by the court of appeals is in direct conflict with this Court's directive in *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958). In that case, the Court ruled that the propriety of discovery sanctions was to be judged against the express powers granted by Fed. R. Civ. P. 37, and the other rules of civil procedure, *and not by notions of inherent power.* This Court made it clear that reliance on inherent power "can only obscure analysis" of the propriety of discovery sanctions. 357 U.S. at 207.

By relying on "inherent power," the court of appeals in fact "obscured the analysis" of the propriety of the severe sanctions entered by the district court. If, as

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[5] Similarly, no contempt may be imposed for failure to comply with an order to produce witnesses, when such order is issued in contravention of Rule 45. *See* In re Guthrie, 733 F.2d 634, 639 (4th Cir. 1984) (reversing order holding nonresident witness in contempt for refusing to appear before forum court).

claimed by Brockton, First United had violated three other district court discovery orders prior to the issuance of the magistrate's order directing the appearance of the nonresidents, the magistrate had *express* power to recommend sanctions against First United under Rule 37(b)(2), a fact recognized by the court of appeals. (App. 10a). Hence, no resort to inherent power was necessary.[6] The issue before the court below was whether First United's violation of the March 1 oral order could serve as an *independent ground*, and indeed the principal ground, for an award of extreme sanctions, where such order exceeded the subpoena powers granted by Rule 45. The court of appeals thus fell into precisely that error against which this Court cautioned in *Rogers*.

B. *The Court of Appeals' Analysis Conflicts with Applicable Decisions of This Court and Courts of Appeals That There Is No Inherent Judicial Power in Excess of Power Granted by Governing Statutes or Rules of Civil Procedure.*

The court of appeals held, in effect, that a district court has inherent power to compel the presence of nonresidents in the forum to enable the court to explore and remedy abusive litigation practices. This analysis contravenes the express limitations on the district court's subpoena powers embodied in Rule 45(e)(1). It thus conflicts with applicable decisions of this Court and courts of appeals concerning the interplay between inherent power and governing statutes or rules of civil procedure.

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[6] The court of appeals' resort to "inherent power," a needless one if the court felt that it had express power to sustain the default based on First United's ostensible violations of other discovery orders, is strong evidence that such other violations were not so egregious as to warrant the sanctions imposed. The absence of any finding by the magistrate that First United's other conduct, standing alone, justified the default is instructive on this point. *See*, n.10, *infra*.

"The Federal Rules of Civil Procedure govern procedures in all civil suits in the United States district courts unless otherwise specified, Fed. R. Civ. P. 1, and these Rules have the effect of law through the power delegated by Congress to the Supreme Court in the Rules Enabling Act of 1934, 28 U.S.C. § 2072." *In re Guthrie*, 733 F.2d 634, 637 (4th Cir. 1984). *See also United States for the Use of Tanos v. St. Paul Mercury Insurance Co.*, 361 F.2d 838, 839 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966); *Rumsey v. George E. Failing Co.*, 333 F.2d 960, 962 (10th Cir. 1964); *Nordmeyer v. Sanzone*, 315 F.2d 780, 781-82 (6th Cir. 1963). This Court has declared that the judiciary has "no power to rewrite the Rules by judicial interpretations." *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

As recently as November 18, 1985, this Court reaffirmed the principle that, where a statute or rule confers powers on the judiciary, the terms of the specific grant, and not expansive conceptions of judicial authority or inherent power, determine the scope of the power at issue. In *Pennsylvania Bureau of Correction v. United States Marshals Service*, 54 U.S.L.W. 4001 (U.S. Nov. 18, 1985) (No. 84-489), this Court held that a district court lacks authority to issue writs compelling the United States Marshals Service to transport state prisoners, not otherwise in the Marshals' custody, to a federal courthouse to testify.[7] The Court held that, because the powers afforded by 28 U.S.C. § 2243 (writs of habeas corpus *ad testificandum*) and Fed. R. Civ. P. 81(a)(2) (same) expressly extend only to custodial prisoners, writs directing the production of noncustodial prisoners were in excess of the district court's powers. 54 U.S.L.W. at 4003.

Rejecting the contention that the broad, generalized expression of judicial power in the All Writs Act, 28 U.S.C. § 1651, authorized the contested writs, the Court stated:

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[7] The Court left open the question whether such writs might be lawful in extraordinary circumstances. 54 U.S.L.W. at 4003.

> The All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.

54 U.S.L.W. at 4003. The Court implicitly disavowed the argument, raised in Justice Stevens' dissenting opinion, that the challenged order was an appropriate exercise of the district court's inherent power. 54 U.S.L.W. at 4005.[8] *See also Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975). The court of appeals' ruling also conflicts generally with the holdings of various circuit courts of appeals that inherent powers may be invoked only in the absence of contrary legislative intent or direction. *See, e.g., Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 563 (3d Cir. 1985); *Ex parte United States*, 101 F.2d 870, 878 (7th Cir.), *aff'd sub nom. United States v. Stone*, 308 U.S. 519 (1939).

The ruling below is the first instance in which inherent power has been invoked to expand the subpoena powers conferred by Rule 45. As such, the ruling is in direct conflict with the Fourth Circuit's ruling in *In re Guthrie*, 733 F.2d 634 (4th Cir. 1984). In *Guthrie*, the Fourth Circuit reversed a contempt judgment predicated on the refusal of a nonresident, non-party witness to comply with a Rule 45(d) deposition subpoena served outside

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[8] At bar, the court of appeals' analogy to the judiciary's inherent power to investigate fraud in procuring judgments (App. 12a) was misplaced. First, Fed. R. Civ. P. 60(b), and the Advisory Committee notes thereto, establish that Rule 60(b) does not limit the previously existing power of the judiciary to investigate fraud in obtaining a judgment. Second, Rule 60(b), and those cases concerning the inherent power to investigate fraud, acknowledge the limitations imposed by the applicable statutes or rules of civil procedure. *See, e.g.*, Universal Oil Prod. Co. v. Root Refin. Co., 328 U.S. 575, 580 (1946) (A federal court's inherent power to investigate whether a judgment was obtained by fraud includes the power to "bring before it *by appropriate means* all those who may be affected by the outcome of its investigation."; emphasis added).

the judicial district wherein the subpoena had issued. The district court had denied a motion to quash the subpoena, finding that it had "inherent power" to issue it. *Id.* at 636. The Fourth Circuit reversed:

> *Whatever inherent powers the district courts may once have had, they now have no power to issue a deposition subpoena unless expressly or impliedly so authorized by the Rules.* Neither plaintiff nor the District Court has identified any authority in support of such an extraordinary notion of "inherent power" exceeding the scope of the Rules.

Id. at 637 (emphasis added). Turning to an analysis of Rule 45, the Fourth Circuit concluded:

> [Rule] 45(e)(1) only authorizes the clerk of the district court where a hearing or trial is held to issue subpoenas compelling attendance, and unlike 45(d), is quite explicit about the geographic limits of valid service . . . . [quotation of rule omitted] Thus, a nonparty witness outside the state in which the district court sits, and not within the 100-mile bulge, may not be compelled to attend a hearing or trial, and the only remedy available to litigants, if the witness will not attend voluntarily, is to take his deposition pursuant to [Rule] 45(d).

Id. (citation omitted). Thus, contrary to the court of appeals' ruling at bar, the Fourth Circuit has held that the express terms of Rule 45, and not broad conceptions of inherent power, mark the boundaries of the district court's subpoena powers.

The decision below also conflicts with the ruling of the Fifth Circuit in *GFI Computer Industries v. Fry*, 476 F.2d 1 (5th Cir. 1973). In *GFI*, the district court had entered a default judgment against a nonresident defendant, in part because the defendant had refused to obey a court order compelling defendant's appearance at trial. The Fifth Circuit reversed the default as "incorrect," without reference to notions of "inherent power,"

ruling that "the court had *no* power to force a civil defendant outside its subpoena jurisdiction to appear personally at the trial and there submit to examination. . . ." *Id.* at 5 (emphasis added). Thus, unlike the opinion below, the Fifth Circuit's ruling prohibits a district court from imposing a sanction based even in part on a nonresident's refusal to obey an order to attend a hearing in the forum.[9]

This Court should grant certiorari to resolve the critical balance between Rule 45 and the inherent power of the lower federal courts.

C. *The Court of Appeals' Analysis Offends Traditional Principles of Due Process.*

Discovery sanctions are subject to the due process requirements of the Fifth Amendment. *Insurance Corporation of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705-07 (1982); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) ("The provisions of Rule 37 which are here involved must be read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law . . . .").

This Court has repeatedly admonished that entry of a default judgment, or the foreclosure of a party's right to litigate particular issues, raises due process concerns. *Insurance Corporation of Ireland*, 456 U.S. at 705-07; *Rogers*, 357 U.S. at 209; *Hammond Packing Co. v. Ar-*

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[9] The court of appeals, apparently senstitive to the mandates of Rule 45, speculated that the order to produce the nonresidents might be valid if the March 6 hearing was viewed not as a "hearing" in the Rule 45(e)(1) sense, but as a "depositional hearing." (App. 11a). The court did not hold that the March 6 hearing was a "depositional hearing," the precise nature of which is unclear. At bar, First United's counsel offered the deposition testimony of his client's representatives in lieu of their attendance at a hearing. (App. 62a). The magistrate rejected this offer. (*Id.*)

kansas, 212 U.S. 322 (1909). In *Hammond Packing*, the Court decided that the due process concerns raised by default or issue foreclosure as discovery sanctions are overcome by an adverse presumption that there is no merit to the claims or defenses of a party who fails to comply with [illegible]'s discovery orders. In affirming a state court default judgment for failure to comply with discovery orders, the Court stated:

> [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

212 U.S. at 351. Conversely, as the Court noted in *Insurance Corporation of Ireland*, 456 U.S. at 706, "[d]ue process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption."

At bar, First United's behavior does *not* support the *Hammond Packing* presumption because the March 1 order was invalid. First United's disobedience of the March 1 order to produce the nonresidents may just as likely be attributed to the invalidity of the March 1 order as it may be to any *Hammond Packing* presumption concerning the lack of merit of First United's defenses to Brockton's claims. It was precisely this ambiguity that led this Court to stress in *Hammond Packing*:

> In so deciding [that the default was properly premised on an adverse presumption about the merits] our conclusion is, of course, based upon the legality and sufficiency of the order to produce [evidence] . . . .

212 U.S. at 354. In premising its affirmance of the magistrate's March 1 order on the *Hammond Packing* presumption (App. 10a), the court of appeals failed to consider that the presumption, necessary to satisfy the Due Process Clause, is itself premised on the legality of the March 1 order. If the order was invalid, then "the be-

havior of [First United] will not support the *Hammond Packing presumption*," with the result that "[d]ue process is violated." *Insurance Corporation of Ireland*, 456 U.S. at 706.

This case exemplifies the due process difficulties presented by the court of appeals' analysis. First United could not have been aware of the "inherent power" of courts to order the appearance of witnesses beyond the scope of Rule 45(e)(1). Unlike the powers cited in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980), no such inherent power to subpoena nonresidents beyond one hundred miles existed prior to the decision below. Even prior to adoption of the federal rules of civil procedure, the power of the federal courts to compel attendance of nonresident witnesses was circumscribed. *See, e.g.*, 2 R. Foster, *A Treatise on Federal Practice* § 342 (6th ed. 1920). This limitation has existed from the earliest days of the Republic. In *Henry v. Ricketts*, 11 F. Cas. 1189 (C.C.D.C. 1809) (No. 6,386), for example, the court refused to hold a witness in contempt for refusing to travel over one hundred miles from his residence in order to testify. This history, in addition to the present language of Rule 45(e)(1), demonstrates that there is no warrant for the creation by the court of appeals of a new "inherent power."

The court of appeals' opinion was influenced by a strong desire to defer to the magistrate's exercise of discretion.[10]

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[10] The court of appeals stated in note 7 of its opinion that the magistrate had a sufficient basis, apart from First United's failure to produce the nonresidents, for recommending a default judgment. (App. 14a). *But this was a finding that the magistrate did not himself make. See generally* App. 83a-110a. In National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642 (1976), this Court observed that a court of appeals should not decide whether it would have issued the contested sanctions, but should confine itself to a review of the district court's exercise of discretion. This principle, of course, must be applied evenhandedly, whether the effect is to uphold or overturn sanctions. The court of appeals should have

(App. 10a). Yet whether a district court has the power, inherent or express, to subpoena nonresidents, and whether severe sanctions for disobedience offend due process, are not matters of discretion. The creation of a new "inherent power" merely to uphold a particular exercise of the district court's discretion is subject to the same conceptual infirmities in the civil arena as is *ex post facto* legislation. If the court of appeals' ruling is sustained, litigants will have little if any notice concerning the true limits and scope of federal judicial power.

II. The Court of Appeals Substantially Limited the Scope of Post-Default Hearings to Assess Damages Pursuant to Fed. R. Civ. P. 55.

First United contended below that it was entitled to an evidentiary, post-default hearing to assess damages, pursuant to Fed. R. Civ. P. 55. First United would have sought to establish at such a hearing that some or all of Brockton's loss was proximately caused by Brockton's decision to ignore the FDIC's insurance limits by investing $1,000,000 in an essentially uninsured CD bearing an attractive 16% interest rate, as well as to address whether Brockton, a local savings bank, had complied with all laws and regulations governing such investments.[11] First United cited below those authorities that hold that, although a default judgment forecloses *liability* issues, it does *not* foreclose issues related to the existence *or scope* of the alleged loss. *See, e.g., Eisler v. Stritzler*, 535 F.2d 148, 153-54 (1st Cir. 1976); *Flaks v. Koegel*, 504 F.2d 702, 707 (2d Cir. 1974); *Trans World Airlines v. Hughes*, 449 F.2d 51, 70 (2d Cir. 1971), *rev'd on other grounds*

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required the magistrate to determine in the first instance whether there existed other sufficient grounds for his severe sanctions beyond disobedience of the March 1 order.

[11] Such investments are insured by the FDIC up to $100,000, the same amount of coverage afforded by the FSLIC, which insures deposits by Brockton's customers.

sub nom. Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363 (1973). First United also argued that it was entitled to establish the portion of Brockton's loss attributable to Peat Marwick's conduct. *See, e.g., Gulf Coast Fans, Inc. v. Midwest Electronics Importers, Inc.*, 740 F.2d 1499, 1512 (11th Cir. 1985); *Fehlhaber v. Indian Trails, Inc.*, 425 F.2d 715, 717 (3d Cir. 1970) (degree of fault of joint tortfeasor went to extent of damages and was not admitted by default).

The court of appeals ruled that the causation issue was foreclosed, distinguishing *Hughes* on the ground that Brockton's *total* investment in Penn Square, plus interest and less FDIC reimbursements, was precisely ascertainable—that is, liquidated and certain. (App. 14a-17a). In so ruling, the court of appeals overlooked the novel issue raised at bar, namely whether a defaulted defendant is entitled to reduce otherwise liquidated and certain damages on the ground that the entire amount of such damages was not *caused* by the wrongful acts deemed established by the default.

It is true, as the court of appeals noted, that "there is no question as to the precise amount of Brockton's total losses *stemming from its investment in the Penn [Square] CD*" (App. 15a; emphasis added)—$1,000,000 less FDIC reimbursements plus interest. Nonetheless, there remains a serious question as to the precise amount of Brockton's total loss *proximately caused* by First United's alleged wrong. This causation issue is raised by Brockton's independent conduct, following the alleged misrepresentation by First United, in investing an amount greatly in excess of the FDIC's insurance limits. Thus, although Brockton's total loss may be liquidated and certain, that portion of its loss proximately caused by First United's misconduct is unliquidated and uncertain.

The court of appeals avoided the unique question presented by this case by noting that Brockton had *alleged*

that First United's conduct caused Brockton's total loss, and that Brockton's "allegations of fact must be taken as true. . . ." (App. 15a). Although it is true that the well-pleaded, factual allegations of the complaint are taken as established by a default, allegations relating to damages are excepted from this rule, and inquiry as to them is not foreclosed. *Eisler v. Stritzler*, 535 F.2d at 153-54. Brockton's allegation as to the cause of its loss is only *in part* a liability allegation. To the extent that Brockton alleged that First United's wrong caused it to invest at all, that fact may well have been established by the default. To the extent that Brockton alleged that *all* of its losses were proximately caused by First United's conduct, that allegation relates to the scope of damages and was not adjudicated by the default.

In *Hughes*, wherein a default was entered for refusal to attend a deposition, the Second Circuit enunciated this precise distinction:

> The default judgment proved the fact of the diversion (the injury) and its illegality. But to recover damages, plaintiff was necessarily required to establish that those damages were attributable to the diversion. *Thus, however well-pleaded the allegations that profits were diverted, plaintiffs in* Jones *could not avoid, to the extent necessary to establish the causal nexus for the recovery of damages, introducing evidence relating to the diversion alleged.* (emphasis added).
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> * * * *
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> [The master's] formulation that the "burden of establishing proximate cause is satisfied *as to liability* (emphasis in the original) if proximate cause is adequately alleged in the complaint" . . . is consistent with our own understanding of the law . . . .

449 F.2d at 70.

The question whether and to what extent a plaintiff's conduct contributes to its damages remains open after default, as a corollary of the general rule that proximate

cause as to damages is not foreclosed. For example, in *Hughes*, the impact of TWA's alleged failure to exercise reasonable diligence on the amount of its damages was examined at the post-default hearing to assess damages. *Id.* at 74-75. Similarly, allegations concerning TWA's alleged failure to mitigate its damages remained open for consideration. *Id.* at 75. The court of appeals' opinion below does not explain why, for example, a plaintiff's failure to mitigate would remain open only when damages are unliquidated, as in *Hughes*. Mitigation is just as likely to decrease the amount of liquidated and certain damages for which the defendant has been deemed liable by the default.

The effect of the court of appeals' ruling is perhaps best illustrated by example. If Brockton, after First United made its alleged misrepresentations concerning Penn Square's financial health, had invested its entire assets—clearly a liquidated amount—in a Penn Square CD insured to a maximum of $100,000, such lack of reasonable care by Brockton would be held to have caused a substantial part of its loss. It would surely be relevant to consider what proportion of its assets a reasonable local savings bank should invest in excess of the FDIC's insurance limits on the strength of a seller's representations, even though the seller might still be held liable for a portion of the total, liquidated loss.

All such inquiries are now foreclosed by the court of appeals' ruling. Indeed, if the court of appeals' opinion stands, as long as the total dollar amount of a plaintiff's loss is known, a defaulted defendant is now barred from reducing the damage award to less than the entire loss, even if a substantial portion of the loss is proximately caused by factors wholly unrelated to the defendant's conduct.[12]

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[12] This Court's reversal of the Second Circuit's decision in *Hughes* was on other grounds, leaving the causation issue raised at bar unresolved. *See* discussion of *Hughes* in 10 C. Wright, A Miller, & M. Kane, *Federal Practice and Procedure* § 2688 (2d ed. 1983).

CONCLUSION

For the foregoing reasons, First United respectfully prays that the Court grant its petition for a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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